No. 97-1889

Supreme Court, U.S.
FILED
JUN 23 1998
CLERK

In The

# Supreme Court of the United States

October Term, 1997

BYUNG WHA AN and YOUNG-KAW AN,

*Petitioners,*

*vs.*

DOO-HWAN CHUN, TAE-WOO ROH, SAE-CHANG CHOE, SAE-DONG CHANG, WHA-PYUNG HUR, SAM-SOO HUR, KWAN-DAL CHUNG, HAK-SUNG YOO, JUN-BYUNG PARK, HEE-DO PARK and HAK-BONG LEE,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS DOO-HWAN CHUN AND TAE-WOO ROH

ROGER L. HILLMAN
GARVEY, SCHUBERT & BARER
1191 Second Avenue
18th Floor
Seattle, Washington 98101-2939
(202) 464-3939

ROBERT H. BUNZEL
*Counsel of Record*
BARTKO, ZANKEL, TARRANT & MILLER
900 Front Street
Suite 300
San Francisco, California 94111
(415) 956-1900

*Attorneys for Respondents Doo-Hwan Chun and Tae-Woo Roh*

146985

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

19 pp

## QUESTION PRESENTED

Is it proper to dismiss an action against foreign leaders for lack of personal jurisdiction, where there was no competent evidence in the record that respondents had sufficient minimum contacts with the state forum or with the United States, and petitioners did not request jurisdictional discovery until *after* the appellate opinion issued?

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**APPENDIX**

Appendix 1 — Order Granting Motions To Dismiss Of The United States District Court For The Western District Of Washington At Tacoma Filed August 30, 1996 ..... 1a

## OPINIONS BELOW

Petitioners state (Pet. at 2) that they attach the unpublished opinion in which the District Court dismissed this action. In fact, they provide only the entry of judgment. Petitioners' Appendix D. Respondents supply the District Court's opinion at Appendix 1 hereto.

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause, as interpreted by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ("due process requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ").

## STATEMENT OF THE CASE

On January 5, 1996, Young-Kae An ("An") filed the instant action in United States District Court for the Western District of Washington on behalf of his deceased father, Byung Wha An, who was allegedly a former police chief in the Kwanju province of South Korea. ("Chief An.") Respondents' Appendix 1 at 2. The complaint, brought pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350, accused respondents Doo-Hwan Chun ("Chun") and Tae-Woo Roh ("Roh"), and other former officials of the South Korean military, of responsibility for the torture of Chief An in 1980, which allegedly caused his death eight years later. Respondents are not alleged to have been personally involved in the torture. Petitioners' Appendix B at 2. The conduct alleged occurred entirely in South Korea.

On June 28, 1996, respondents moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service, *forum non conveniens*, and on grounds of international comity. Respondents' Appendix 1 at 1. In support of the motion, respondents provided declarations demonstrating they lacked sufficient minimum contacts with the State of Washington and the United States to permit imposition of personal jurisdiction. Chun Decl. (filed in the dist. ct. on 6/28/96); Roh Decl. (filed in the dist. ct. on 6/28/96). Petitioners filed an opposition, but made no effort whatsoever to introduce factual evidence to rebut respondents' evidence that minimum contacts were lacking. *See* Plaintiffs' Opp'n to Mot. to Dismiss (filed in the dist. ct. on 8/5/96).

On August 30, 1996, the District Court granted the motion to dismiss, with prejudice, for lack of subject matter jurisdiction. Respondents' Appendix 1 at 2-3. The District Court did not address personal jurisdiction, or the other bases advanced in favor of dismissal. *Id.* at 3. An appealed. On March 16, 1998, the Court of Appeals for the Ninth Circuit affirmed on alternative grounds, ruling in a brief, unpublished opinion that the District Court lacked personal jurisdiction over respondents. Petitioners' Appendix B at 2.

In a petition for rehearing filed in the Court of Appeals on February 13, 1998, petitioners requested, for the first time, discovery on the subject of personal jurisdiction. Pet. at 9; Plaintiffs' Pet. for Reh'g at 3-4 (filed in the Court of Appeals on 2/13/98). The Court of Appeals denied the petition for rehearing on March 6, 1998. Petitioners' Appendix C.

## REASONS FOR DENYING THE WRIT

The opinion of the Court of Appeals rests on a sound application of well established principles of law. The Court upheld the dismissal of the complaint because respondents did not have sufficient minimum contacts with the forum to enable the District Court to impose personal jurisdiction here.[1] Petitioners' Appendix B at 3. Because that ruling is correct, and presents no novel issues of law upon which courts are divided, certiorari is not appropriate.

### I.

### PETITIONERS MUST ESTABLISH SUFFICIENT MINIMUM CONTACTS WITH THE FORUM TO WARRANT PERSONAL JURISDICTION.

The Due Process Clause requires that an action be brought only in a forum where there is proper personal jurisdiction over the defendant. *International Shoe*, 326 U.S. at 310. This requirement is neither abandoned nor relaxed when a claim is brought against foreign leaders under the Alien Tort Claims Act. 28 U.S.C. § 1350. As stated in *Armerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987):

> Of course, even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant.

*Id.* at 428, *rev'd on other grounds*, 488 U.S. 428 (1989).

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1. Petitioners attempt to obscure the basis for the Court of Appeals' ruling. They write: "However, the controversy in this case arises from the Appeals Court's application of the Foreign Sovereign Immunities Act ("FSIA") to a claim against foreign individuals." Pet. at 4 (emphasis in original deleted). Rather, the court expressly *declined* to address FSIA. The court stated: "We do not reach that question because we dismiss on the ground that the court lacks personal jurisdiction over appellees." Petitioners' Appendix B at 2.

Courts consider it self-evident that all actions, including alien tort claims, require personal jurisdiction be first established. As the Ninth Circuit noted in *In re Estate of Ferdinand E. Marcos Litigation (Marcos I)*, 978 F.2d 493, 500 (2d Cir. 1992), an opinion explaining the limitation of jurisdiction under 28 U.S.C. § 1350:

> Such limitations as venue and the doctrine of forum non conveniens are available in 1350 cases as in any other. Finally, it goes without saying that *personal jurisdiction must first be obtained.*

*Id.* at 500 (emphasis added).[2]

It was petitioners' burden to demonstrate the District Court could exercise personal jurisdiction over respondents, consistent with the constraints imposed by due process. *See Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392, 1396 (9th Cir. 1986).[3]

Due process constraints on personal jurisdiction are satisfied if the defendant is served with process within the forum, *Burnham v. Superior Court*, 495 U.S. 604 (1990), is domiciled in the forum,

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2. In passing the 1991 Torture Victims Protection Act (codified in the notes to 28 U.S.C. § 1350), Congress expressed a clear, unambiguous legislative intent not to turn "U.S. courts into tribunals for torts having no connection to the United States whatsoever." P.L. 102-256, S. Rep. No. 249, at Section IVD (1991).

3. Personal jurisdiction in the District Court was subject to the longarm statute of the State of Washington, Wash. Rev. Code § 4.28.185, which reaches as far as the Due Process Clause permits. *Omeluck v. Lansten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995). Nor did petitioners establish facts supporting personal jurisdiction based on a "national contacts" test. *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1314-16 (9th Cir. 1985). *See* Petitioners' Appendix B at 3.

*Milliken v. Meyer*, 311 U.S. 457 (1940), consents to jurisdiction there, *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990) (consent by appearance), *cert. denied*, 498 U.S. 926 (1990); *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964) (express consent), or has sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

It is undisputed that respondents Chun and Roh were not served in Washington State or in the United States, are not domiciled here, and do not consent to jurisdiction in Washington or anywhere else in this country. Therefore, personal jurisdiction, if it exists, must be based on minimum contacts with the applicable forum. *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447 (9th Cir. 1991). For the reasons stated below, the Court of Appeals was correct in concluding sufficient minimum contacts are lacking.

## II.

## RESPONDENTS PRESENTED UNREBUTTED EVIDENCE THEY LACK SUFFICIENT MINIMUM CONTACTS TO PERMIT THE IMPOSITION OF PERSONAL JURISDICTION HERE.

In moving to dismiss, respondents Chun and Roh filed declarations in the District Court demonstrating they do not own property, or conduct business in the forum state or in the United States. Chun Decl.; Roh Decl. Aside from a one-week vacation to Hawaii, respondents Chun and Roh only visited the United States in their official capacities. As the Court of Appeals noted, official governmental visits generally do not confer jurisdiction. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51-52 (2d Cir. 1991). Moreover, contact with the forum must be measured in 1996, the

year the complaint was filed. *Id.* at 52. In 1996, respondents Chun and Roh were incarcerated in Korea. Decl. of Doo-Hyung Do at 2 (filed in dist. ct. on 6/28/96).[4] Their official visits to the United States occurred many years prior to the current action.

Petitioners opposed the motion to dismiss, but provided no factual information sufficient to establish personal jurisdiction. Their District Court brief contained only speculation and conclusory allegations: *e.g.*, "*It is very likely* that they have invested money overseas, and the United States seems a very likely place to put *some* money." Plaintiffs' Opp. to Mot. to Dismiss at 11 (emphasis added). Of course, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. . . ." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

Considering petitioners' failure to rebut the evidence presented by respondents, it is not at all surprising the Court of Appeals found personal jurisdiction was lacking. The court stated:

> Appellees have not engaged in the necessary activity in the United States to confer either general or specific jurisdiction. They do not own property or conduct business anywhere in the United States. Their visits to this country have been almost entirely official visits on behalf of the Korean government, which do not confer general jurisdiction, and were unrelated to the cause of action in this case.

Petitioners' Appendix B at 3.

Dismissal of a complaint due to unrebutted evidence that personal jurisdiction is lacking is not a "compelling reason"

4. We submit this brief on behalf of respondents Chun and Roh. However, we note that petitioners presented no competent evidence in the District Court that *any* respondents had sufficient minimum contacts with the State of Washington and/or the United States in 1996.

justifying extraordinary review by this Court. Sup. Ct. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons"); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 449-50 (1959) (noting certiorari is "a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise") (Frankfurter, J. dissenting).[5]

## III.

## THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY DENYING A REQUEST FOR JURISDICTIONAL DISCOVERY MADE FOR THE FIRST TIME IN A PETITION FOR REHEARING.

After the motion to dismiss was filed, petitioners made no effort in the District Court to request discovery on the subject of personal jurisdiction. *See* Plaintiffs' Opp. to Mot. to Dismiss. In fact, they made no such request until they filed their petition for rehearing in the Court of Appeals on February 13, 1998. In that brief, filed after petitioners lost in the district and circuit courts, petitioners sought, for the first time, permission to depose respondents "to see whether they had sufficient contacts with the United States." Plaintiffs' Pet. for Reh'g at 3.

The Court of Appeals implicitly denied this request when it issued a summary order denying the petition for rehearing.

5. We note petitioners' first question presented states as fact their unsubstantiated claims that respondents have purchased property and invested money in the United States. Pet. at p. (i). This is not proper. Indeed, the Court of Appeals made findings of fact to the contrary. Petitioners' Appendix B at 3. As indicated, those findings of fact are rooted in an undisputed factual record consisting of unrebutted declarations provided by respondents.

Petitioners' Appendix C. Now petitioners seek certiorari because, according to their analysis, this implied denial constitutes an abuse of discretion. However, "[t]he jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred . . . merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Rather, the purpose of certiorari is to consider issues which are of wide public or governmental interest. *Dick*, 359 U.S. at 945-46 (Frankfurter, J. dissenting). This is not such an issue.

The denial of a belated discovery request, made after full briefing, argument and issued decisions in *both* the district and appellate courts, is clearly a proper exercise of discretion. Indeed, there is no requirement that courts grant untimely requests for discovery. *See, e.g., United States v. Reed*, 2 F.3d 1441, 1447 (7th Cir. 1993) (district court did not abuse its discretion by refusing to entertain an untimely discovery motion); *Chen Chi Wang v. United States*, 757 F.2 1000, 1004 (9th Cir. 1985) (finding no abuse of discretion in district court's denial of untimely discovery request).[6]

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6. Prior to the motions to dismiss being filed, petitioners had requested Korean depositions on the merits of the controversy, but never sought — nor provided any evidentiary basis in support of — limited jurisdictional discovery from the District Court.

## CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT H. BUNZEL
*Counsel of Record*
BARTKO, ZANKEL, TARRANT
& MILLER
900 Front Street
Suite 300
San Francisco, California 94111
(415) 956-1900

ROGER L. HILLMAN
GARVEY, SCHUBERT & BARER
1191 Second Avenue
18th Floor
Seattle, Washington 98101-2939
(202) 464-3939

*Attorneys for Respondents*
*Doo-Hwan Chun and Tae-Woo Roh*

# APPENDIX

## APPENDIX 1 — ORDER GRANTING MOTIONS TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA FILED AUGUST 30, 1996

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C96-5007FDB

AN, BYUNG WHA, et al.,

Plaintiffs,

vs.

CHUNG, DOO-HWANH, et al.,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

This matter comes before the court upon the Motions of all defendants[1] to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service, *forum non conveniens*, and on grounds of international comity. According to the plaintiffs[2], An Byung Wha was the chief of police of Kwang Ju province in South Korea in 1980. Following the assassination of President Park Chung-Hee in 1979 and the declaration of martial law by Defendant Chung (assisted in the

1. Defendants Chun and roe move separately from Defendants Choe, Chang, Hur (Wha-Pyung and Sam-Soo), Chung, Yoo, Park (Jun-Gyung and Hee-Do) and Lee.

2. The following brief recitation accepts the plaintiffs' pleadings as true for the sake of analysis.

military takeover by Defendant Roh), massive public demonstrations took place in Kwang Ju province. The south Korean Army moved in to quell the disturbances. An Byung-Wha refused to cooperate and was himself tortured to death for his noncooperation. His son, plaintiff An Young-Kae, brings suit under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. 1350.

## I. SUBJECT MATTER JURISDICTION

The defendants contend that they are immune pursuant to the Foreign Sovereign Immunities Act ("FSIA"). The plaintiffs argue that the FSIA immunizes only governments, not individuals. However, the defendants correctly note that the Ninth Circuit has ruled that the FSIA applies to individuals sued in their official capacity. *Chuidian v. Phillippine Nat. Bank,* 912 F.2d 1095, 1103 (9th Cir. 1990). While the Complaint is silent as to the capacity in which the named defendants are sued[3], Roh and Chun are named as former generals, and the remaining defendants as "military leaders who took an active part in the KWANGJU Massacre." Complaint at 2. There is no attempt to show that any of the named defendants were personally involved in the torture or death of An Byung Wha. I must therefore conclude that the plaintiffs are suing the defendants in their former official capacities.[4]

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3. The intent to pursue claims in individual or official capacity may be inferred based upon a review of the text of the complaint and other pleadings. *See Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 361 fn.*, 116 L.Ed.2d 301 (1991).

4. Defendants Chun and Roh noted that the plaintiff has argued that service upon the government of South Korea equated to service upon the defendants.

*Appendix 1*

The plaintiffs do not suggest that any of the exceptions to the FSIA apply. "The FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.' " *In Re Estate of Ferdinand E. Marcos Litigation*, 978 F.2d 493 (9th Cir. 1992) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 91(1983)). "[T]he FSIA trumps the Alien Tort Statute when a foreign state or, in this circuit, an individual acting in her official capacity, is sued." *In Re Marcos Litigation, supra*, 978 F.2d at 497. The defendants are thus entitled to dismissal on the grounds of immunity under the FSIA. 28 U.S.C. § 1604.

Accordingly, finding that it is unnecessary to reach the defendants' remaining arguments, it is hereby

ORDERED that the Motions of the defendants are GRANTED and this action DISMISSED for lack of subject matter jurisdiction.

DATED this 30 day of August, 1996.

s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE